Supreme Court, U.S.
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No. 00-1620

IN THE

Supreme Court of the United States

FARRELL LINES INCORPORATED,

Petitioner,

v.

JOSEPH DINO, PATRICIA DINO, AND AMERICAN MARITIME SERVICE OF NEW YORK, INC.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Joseph Dino and Patricia Dino, the Respondents, (hereinafter referred to as "Dino"), respectfully oppose the Petition of Farrell Lines Incorporated (hereinafter the "Petitioner") for Writ of Certiorari. The Petitioner has failed to meet the established considerations governing review on certiorari and has not set forth compelling reasons for this Court to grant the Writ. Specifically, (a) there is no important federal questions which was decided in the Courts below and which conflicts with decisions of another jurisdiction or of a United States Court of Appeals; and (b) the decision from the court below did not address an important question of federal law that has not been settled by this Court. To the contrary, the issue raised by the Petitioner has been addressed, examined, and definitively decided by this Court and followed by the lower courts. For these reasons, the Writ should be denied.

Issue:

I. Whether the Third Circuit Court of Appeals acted in accord with the Supreme Court's decisions, other circuit courts, and legislative intent in determining whether the Petitioner is liable to Dino for personal injuries under the Act?

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Joseph Dino and Patricia Dino, the Respondents, (hereinafter referred to as "Dino"), respectfully oppose the Petition of Farrell Lines Incorporated (hereinafter the "Petitioner") for Writ of Certiorari. The Petitioner has failed to meet the established considerations governing review on certiorari and has not set forth compelling reasons for this Court to grant the Writ. Specifically, (a) there is no important federal questions which was decided in the Courts below and which conflicts with decisions of another jurisdiction or of a United States Court of Appeals; and (b) the decision from the court below did not address an important question of federal law that has not been settled by this Court. To the contrary, the issue raised by the Petitioner has been addressed, examined, and definitively decided by this Court and followed by the lower courts. For these reasons, the Writ should be denied.

COUNTERSTATEMENT OF THE FACTS

Dino worked for Maher Terminals, Inc., a stevedoring company, as a longshore worker in Port Elizabeth, New Jersey. Dino was working as a hatch boss at the time of the accident, that is, he managed a group of workers assigned to a specified area and ensured that cargo was unloaded from ships to the deck.

On January 18, 1997, the Petitioner's ship, the SS Argonaut, arrived at Maher Terminals in New Jersey laden with ice.1 The ship arrived in port at 6:48 a.m. and the crewmen of American Maritime did not board the ship until 7:30 a.m. There was ice formed aboard the ship. Between 9:30 a.m. and 10:00 a.m., Dino, a longshore worker, was called to the ship because the crane operator was having a problem removing one of the hatches from the ship. As the crane operator was lifting the hatch, Dino stepped back and slipped on the icy deck. He attempted to grab the rail, but the rail was covered with ice as well. As a result, Dino fell to the deck and sustained numerous personal and physical injuries.

As a result, Dino filed a suit in the New Jersey Superior Court against the Petitioner pursuant to Section 905(b) of the Longshore and Harbor Workers' Compensation Act (the "Act"), 33 U.S.C. Section 905(b). The Petitioner removed the case to the United States District Court for the District of New Jersey based on diversity of citizenship and admiralty

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1 On January 17, 1997, the ship's master had called the terminals requesting assistance for ice removal upon the ship's arrival at port. The Petitioner hired American Maritime Service of New York, Inc. ("American Maritime") to de-ice and unlash the ship.

jurisdiction. The Petitioner then filed a third party complaint against American Maritime.

REASONS FOR DENYING THE WRIT

The Longshore and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. Section 901, et. seq., (the "Act"), establishes a comprehensive federal workers' compensation program that provides longshoremen and their families with medical, disability, and survivor benefits for work-related injuries and death. The longshoremen may seek damages in a third party negligence action against the owner of the vessel on which he was injured. 33 U.S.C. Section 905(b).

In 1972, Congress amended the Act which currently states that:

> b) Negligence of a vessel
>
> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person,...may bring an action against such vessel as a third party...If such person was employed by the vessel to provide stevedoring services, no such action shall be permitted if the injury was caused by the negligence of persons engaged in providing stevedoring services to the vessel...The liability of the vessel under this subsection shall not be based upon the warranty of seaworthiness or a breach thereof at the time the injury occurred.

33 U.S.C. Section 905(b).

The amendment eliminated the warranty of seaworthiness and created a cause of action for negligence in favor of an injured longshoreman and against a shipowner. *See Edmonds v. Compaignie Generale Transatlantique*, 443 U.S. 256, 262 (1979). The amendment did not delineate acts or omissions which would amount to negligence. *Scindia Steam Navigation Co. v. DeLos Santos*, 451 U.S. 156, 165 (1981). The scope of the duty owed longshoreman had to be "resolved through the application of the accepted principles of tort law and the ordinary process of litigation. *Id.* at 165-66 (*citing* H.R. Rep. No. 92-1125, 92nd Cong., 2d Sess. (1972)).

The Third Circuit Court of Appeals reversed the District Court of New Jersey's granting of summary judgment. The Court held that: 1) the Petitioner had failed to present evidence that an obvious shipboard hazard could have been avoided; and 2) that statements indicating that longshoremen work in all weather conditions under time pressures were sufficient to establish Petitioner's negligence. In interpreting applicable case law, the Third Circuit analyzed that the Petitioner should have expected that Dino or his employer would not have corrected or avoided an obvious hazard. The Third Circuit questioned material facts of whether the Petitioner met their duty owed to Dino pursuant to accepted principles of tort law.

Summary Judgment should have never been granted by the District Court since there were genuine issues of material facts. *Jefferson Bank v. Progressive Casualty Insurance Co.*, 965 F.2d 1274, 1278 (3rd Cir. 1992); F.R.C.P. 56(c). In our case, the material fact is whether there was a known hazard, that is ice, on the ship that could have been avoided. All reasonable inferences must be drawn in favor of the non-

movant. *Meyer v. Riegel Prods. Corp.*, 720 F.2d 303, 307 n.2 (3rd Cir. 1983).

There are three duties that shipowners have to longshoremen: 1) turn the vessel over in a reasonably safe condition and to warn the stevedore of unsafe conditions on the ship; 2) exercise due care to protect longshoreman from hazards when the shipowner maintains active control of the vessel during the stevedoring operation; and 3) intervene when the shipowner has actual knowledge of the hazard and knows, or should know, that the stevedore cannot be relied upon to remedy it. *Scindia*, at 166-67.

In our case, Dino falls into the first duty, that is, the turnover duty, which is comprised both of a duty to provide safe conditions and a duty to warn of dangers. *Id.* The Third Circuit did not create a strict liability standard as argued by the Petitioner, but, in fact, used the standard established in *Scindia:*

> This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazards on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known to the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his

> work. The shipowner thus has a duty with respect to the condition of the ship's gear, equipment, tools, and work space to be used in the stevedoring operations; and if he fails at least to warn the stevedore of hidden danger which would have been known to him in the exercise of reasonable care, he has breached his duty and is liable if his negligence causes injury to longshoremen.

Id. at 166-67.

The obligation imposed upon the vessel and its crew under the "turnover duty" relates to the condition of the ship upon the commencement of stevedoring operations. *Howlett v. Birkdale Shipping Co.*, 512 U.S. 92 (1994) (under the turnover duty, a longshoreman would have to prove that 1) the shipowner had knowledge of the condition and 2) the hazard would have been neither obvious nor anticipated by a skilled and competent stevedore); *Federal Marine Terminals, Inc. v. Burnside Shipping Co.*, 394 U.S. 404, 22 L.Ed.2d 371, 89 S.Ct. 1144 (1969). A shipowner may be negligent for failing to eliminate an obvious hazard that it could have eliminated, but only when it should have expected that an expert stevedore could not or would not avoid the hazard and conduct cargo operations safely. *Kirsch v. Plovidba*, 971 F.2d 1026, 1030 (3rd. Cir. 1992). The Kirsch court also stated that the appropriate standard is to permit liability, even where a hazard is obvious, if safer alternatives are impractical or time-consuming. *Id.* at 1032, *citing, Morris v. Compagnie Maritime des Chareurs Reunis, S.A.*, 832 F.2d 67, 70-71 (5th Cir. 1987). The fact-intensive question is inappropriate to decide on summary judgment and must be given to the jury. *Id.*

Whether Dino could have avoided the ice and whether the Petitioner should have known that Dino would not have avoided the danger were fact questions for the jury. *See also Griffith v. Wheeling-Pittsburgh Steel Corp.*, 657 F.2d 25 (3rd Cir. 1981) (a vessel owner was negligent where, prior to commencement of stevedoring operations, the owner knew or should have known of a defect in the hatch covers on the vessel and had reason to believe the stevedore might use a negligent method to remove the hatch cover and yet took no steps to correct the condition).

The Third Circuit read *Scindia* and *Kirsch* together to determine whether the following analysis was completed by the District Court: (1) was there a dangerous condition on the ship when it was turned over (was there snow and ice on the deck when cargo operations began); (2) if so, was it obvious (if it was not obvious, the shipowner had to warn Dino); (3) if the icy condition was obvious, was it practical to avoid the ice; (4) if it was practical to avoid the ice, is there evidence that it is customary for experienced longshoremen to confront the icy conditions rather than stop working or remedying it.

There was conflicting testimony as to the condition and safety of the ship and whether the shipowner acted reasonably in addressing the ice condition and whether the ship was safe at the time it was turned over. A jury's function is to resolve the conflicting material facts, not a motion for summary judgment. *Kirsch, supra.*

By this analysis, the Third Circuit did not create any strict liability but did a fact analysis. There was conflicting evidence of whether the ship was safe when Dino was doing his

work. All inferences and issues of credibility had to be viewed in favor of Dino. *Meyer v. Reigel Products Corp.*, 720 F.3d 303, 307 (3rd Cir. 1983).

The Third Circuit decision did not expand or change duties that were already established in its jurisdiction. *See Howlett, supra*; *Davis v. Portline Transportes Maritime International,* 16 F.3d 532 (3rd Cir. 1994); *Serbin v. Bora Corp. Ltd.*, 96 F.3d 66 (1996) (the ship could be liable if a condition existed which could foreseeably cause injury of which it was aware).

The Third Circuit decision is in accord with decisions from other jurisdictions. *See Citizen v. M/V Triton*, 384 F.Supp. 198, 201 (E.D.Tex. 1974); *Spence v. Mariehamns R/S*, 766 F.2d 1504, 1507 (11th Cir. 1985); *Hugev v. Dampskisaktieselskabet Int'l*, 170 F.Supp 601, 606 (1959); (the shipowner had a duty to see that the danger was removed before proceeding to unload the cargo; the failure of a discharging stevedore to identify a hazard and take appropriate steps to protect the longshoreman is negligence); *Anderson v. Iceland S.S. Co.*, 585 F.2d 1142, 1151 (1st Cir. 1978) (if stowage or the cargo itself represents a risk to the longshoremen, the stevedore has the right to remedy the defect, at the expense of the ship or to discontinue unloading operations); *Taylor v. Moran Agencies*, 739 F.2d 1384 (9th Cir. 1984); *Riggs v. Scindia Steam Nav. Co.*, 8 F.3d 1442 (9th Cir. 1993); *Lemon v. Bank Lines, Ltd.*, 656 F.2d 110 (5th Cir. 1981); *Keller v. United States*, 38 F.3d 16, 32 (1st Cir. 1994); *Sarauw v. Oceanic Navigation Corp.*, 655 F.2d 526, 529 (3rd Cir. 1981); *Biggs v. Logicon, Inc.*, 663 F.2d 52 (8th Cir. 1981).

The Petitioner alleges that the Third Circuit created a strict liability standard wherein shipowners automatically become liable to longshoremen. In opposite, the Third Circuit stated that there are material facts that must be reviewed to determine whether there was a duty and a breach of that duty to cause the Petitioner to be negligent. *Scindia* is clear that there are times when shipowners are liable – there is no absolute immunity under the statute and the legislatures never intended an absolute bar to injured longshoremen. Therefore, the Third Circuit acted in concert with applicable law rendered by this Court and followed by other Circuit Courts and in accordance with the intent of the Act.

CONCLUSION

The Court should deny *certiorari* since the Third Circuit followed precedent case law. This case does not raise significant issues or a conflict among the circuits, nor will it have an impact on legislation involving personal injuries suffered by longshore workers. There is no reason for this Court to conduct further review, and this Writ should therefore be denied.

Respectfully Submitted,

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